

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Performance Measurements and Standards)	
For Special Access Services)	CC Docket No. 01-321
)	
Petition of U S West, Inc., for a Declaratory Ruling)	
Preempting State Commission Proceedings to)	CC Docket No. 00-51
Regulate U S West's Provision of Federally)	
Tariffed Interstate Services)	
)	
Petition of Association for Local Telecommunications)	CC Docket Nos. 98-147,
Services for Declaratory Ruling)	96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards)	
Of Sections 271 and 272 of the Communications Act)	CC Docket No. 96-149
of 1934, as amended)	
)	
2000 Biennial Regulatory Review - Telecommunications)	
Service Quality Reporting Requirements)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance)	
Standards, Reporting Requirements, and Self-Executing)	
Remedies Needed to Ensure Compliance by ILECs)	RM 10329
With Their Statutory Obligations Regarding)	
Special Access Services)	

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SUMMARY

The comments convincingly demonstrate that it is crucial for the Commission to adopt standards, comprehensive performance metrics and reporting requirements governing ILEC provision of special access services. CMRS providers and other competitive carriers make such extensive use of ILEC special access facilities that they are properly characterized as being fundamental building blocks for competitive offerings. The dismal ILEC performance regarding special access services has a direct and negative impact on competition in the retail telecommunications market, and ILECs have both the incentive and the ability to distort competition in the retail market and to favor their own services through the power they wield in the wholesale special access market.

ILEC objections to performance standards are not supported by any record evidence. The special access market is not competitive. Special access customers and state regulators emphasize that ILEC market power is overwhelming and, even yet, growing. CMRS carriers are especially vulnerable to ILEC abuses in the special access market because ILECs have unlawfully refused to alternatively provide UNEs to them and because CMRS carriers must deploy widely dispersed cell sites throughout their service areas and, in the vast majority of cases, CMRS carriers have no choice but to use ILEC special access facilities.

ILEC resistance to performance standards/metrics is undercut by the fact that ILECs already maintain data concerning their special access performance, whether for internal purposes or to meet existing federal/state reporting requirements and, therefore,

their additional cost of publishing their performance data is not significant. Unless the Commission requires ILECs to publish their performance data, it will not have the tools to remedy the extensive problems and ILECs will lack the incentive to fix the problem. It is important to emphasize that the current situation is of the ILEC's own doing. The minimal regulatory intervention that competitive carriers seek would not have been necessary had ILECs even provided a minimally acceptable grade of service.

To the extent smaller ILECs face undue burdens, VoiceStream supports adopting less stringent metrics and frequency of reporting for these smaller entities. Given that smaller ILECs exert as much, and often more, dominance in the special access market in their service territories as compared to larger ILECs, any exemption of smaller ILECs from performance metric obligations cannot be justified.

VoiceStream supports the Performance Measurements and Standards proposal advanced by the Joint Competitive Industry Group as clear, workable and enforceable and asks for one supplemental requirement. Reflecting the crucial role that special access services represent for the CMRS industry, VoiceStream urges that a separate reporting category be established for CMRS, distinguishing between entities affiliated, and unaffiliated, with the ILEC. Only in this manner can independent CMRS carriers obtain information as to the true nature of the competitive environment they face with respect to their ILEC-affiliated CMRS competitors.

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REPLY COMMENTS OF VOICESTREAM WIRELESS CORPORATION

VoiceStream Wireless Corporation ("VoiceStream") submits this reply to the comments filed in this proceeding. The comments persuasively demonstrate the critical need for the adoption of performance measurements and standards for incumbent local exchange carrier ("ILEC") interstate special access services. Poor ILEC installation, maintenance and repair of special access facilities have an enormous negative impact on competition in the retail market for tele-

communications services, given that commercial mobile radio service ("CMRS") providers and other competitive carriers make such extensive use of special access facilities in their networks.

I. ILEC OBJECTIONS TO PERFORMANCE STANDARDS LACK MERIT

ILECs contend that performance standards are unnecessary because the special access market is competitive. They alternatively assert that the costs of preparing reports based on data they already possess outweigh the benefits of publishing their special access installation, maintenance and repair data. Importantly, the problem with these arguments is that the ILECs do not recite a single fact in support. In fact, all available evidence confirms that the special access market is not competitive and that the preparation of reports that would reveal discriminatory or unreasonable conduct would impose no substantial burdens on the ILECs – although some ILECs may find disclosure of their performance to be humiliating.

A. ILEC Myth No. 1: The Special Access Market Is Robustly Competitive

ILECs assert that reporting requirements and measurement standards are unnecessary because the market for their special access services is "rife with competition" and "vigorously competitive."¹ The simple response is that not a single user of these facilities — whether a CMRS provider,² a competitive LEC,³ a long distance carrier,⁴ or a non-carrier corporation special access customer⁵ — agrees with this assertion. Moreover, every state regulator participating

¹ Verizon Comments at 4 and 6. *See also* Qwest Comments at 6-9; SBC Comments at 2-3 and 8-10; United States Telecom Association ("USTA") Comments at 2.

² *See, e.g.*, Comments filed by VoiceStream Wireless and AT&T Wireless.

³ *See, e.g.*, Comments filed by the Association for Local Telecommunications Services ("ALTS"); Association of Communications Enterprises ("ASCENT"); DIRECTV Broadband Comments; Cable & Wireless Comments; and Competitive Telecommunications Association ("CompTel").

⁴ *See, e.g.*, Comments filed by AT&T, Sprint, and WorldCom.

⁵ *See, e.g.*, Comments filed by the Ad Hoc Telecommunications Users Committee ("Users Committee") and the American Petroleum Institute.

in this proceeding urges the Commission to adopt national standards.⁶ For example, New York recognizes that the problem is extensive and can be solved only through imposition of federal standards:

Verizon's provision of special services has been less than adequate. * * * The ILECs are still the dominant providers of these services and uneven performance threatens to undermine competition. For example, Verizon, on average, met only 74% of its appointments on carrier service requests, but met 94% of its retail customer appointments.⁷

In making their assertions regarding competitiveness, ILECs rely on the number of CLECs that have collocation facilities at certain of their wire centers.⁸ However, CLECs can provide a competitive alternative only if they have facilities at the other end where the connection is needed – whether the location is a cell site or a particular customer. The data compiled in the nation's most competitive market, New York City, confirms that CLECs currently serve only a tiny fraction of the locations served by the incumbent LEC.⁹ Therefore, clearly CLECs themselves do not have ubiquitous networks as these ILECs suggest and therefore, CMRS carriers cannot rely on CLECs for alternative sources of special access.¹⁰

ILECs also point to the *Pricing Flexibility Order* as suggesting that the Commission has already determined that the special access market is competitive.¹¹ In fact, in that *Order* the

⁶ See, e.g., Comments filed by the Illinois Commerce Commission ("ICC"); the Minnesota Department of Commerce; the New York State Department of Public Service ("NYDPS"); and the Public Utility Commission of Texas.

⁷ NYDPS Comments at 2 and 3. Given this disparate installation data, Verizon's assertion that its processes "assure that all special access orders are provisioned in a nondiscriminatory manner, regardless of the identify of the customer (Verizon Comments at 11), is not credible.

⁸ See, e.g., USTA Comments at 3-5; Verizon Comments at 5-6; Qwest Comments at 8.

⁹ See, e.g., AT&T Comments at 8-10; ASCENT Comments at 4.

¹⁰ See "How Effort to Open Local Phone Markets Helped the Baby Bells," Wall St. Journal, pp. A-1, A-14 (Feb. 11, 2002).

¹¹ See, e.g., Verizon Comments at 7-9; BellSouth Comments at 12-14.

Commission explicitly declined to find that the special access market is sufficiently competitive to justify classifying ILECs as non-dominant.¹² In addition, all available evidence in markets where ILECs currently possess pricing flexibility confirms that the special access market is not competitive. For example, although in these markets ILECs have the flexibility to negotiate off-tariff pricing plans, ILECs generally refuse to depart from their non-price cap regulated tariffs.¹³ In addition, as the Ad Hoc Users Committee documents, ILEC rates are “*higher* in markets where the Commission has granted ILECs Phase II pricing flexibility than in markets subject to price cap regulation – an outcome that is exactly the opposite of what a competitive market would produce.”¹⁴

Verizon asserts that “[p]oor [ILEC] service will result in marketplace penalties” because special access customers will “take their business to an alternative provider.”¹⁵ VoiceStream wishes this were the case. VoiceStream’s comments demonstrated, however, that in the New York MTA during 2000 and 2001, Verizon missed 72 percent of the Firm Order Commitment (“FOC”) dates that Verizon itself established for VoiceStream circuits.¹⁶ Given this dismal performance record, does the Commission really believe that VoiceStream would keep using Verizon if it could use alternative providers of special access circuits?

In summary, all available evidence confirms what special access customers already know: in most locations, ILECs possess a dominant market position in the special access market. What makes this dominance so dangerous is that competitive carriers use ILEC special access

¹² See *Pricing Flexibility Order*, 14 FCC Rcd 14221, 14300 ¶ 151 (1999).

¹³ See, e.g., AT&T Wireless Comments at 12-13.

¹⁴ Users Committee Comments at 2-3 and Appendix 1 (emphasis in original).

¹⁵ Verizon Comments at 20-21.

facilities as fundamental network building blocks for their own competitive retail services. Thus, poor ILEC special access circuit performance adversely affects competition in the retail market for telecommunications, and gives ILECs both the incentive and the ability to skew this competition in favor of their own retail services.

B. ILEC Myth No. 2: Competitive Carriers Do Not Need Special Access Facilities

BellSouth alone asserts that, because of the availability of unbundled network elements (“UNEs”), it is “incontrovertible that ILEC special access is not necessary for CLECs to compete with ILECs.”¹⁷ While BellSouth’s argument might have some merit if UNEs were universally available,¹⁸ the fact remains that BellSouth and other ILECs have unlawfully refused to provide UNEs to VoiceStream and other CMRS carriers.

Section 251(c)(3) imposes a clear duty on ILECs to provide UNEs. The Act defines a “network element” to include “a facility or equipment used in the provision of a telecommunications service.”¹⁹ The transport circuits that CMRS carriers use to connect their mobile switching centers (“MSCs”) with their base stations are “a facility . . . used in the provision of a telecommunications service.” Yet, despite this unequivocal statutory mandate, BellSouth and other ILECs have consistently refused to provide to VoiceStream the UNEs it has requested.

¹⁶ See VoiceStream Comments at 9. Missing 72% of FOC dates is not, as Verizon would have the FCC believe, an “isolated problem.” Verizon Comments at 3.

¹⁷ BellSouth Comments at 16-18.

¹⁸ As other commenters point out, UNEs are not universally available. Among other things, some ILECs refuse to combine network elements, and many ILECs refuse to provision UNEs when existing facilities are not available. See, e.g., AT&T Comments at 5-6.

¹⁹ 47 U.S.C. § 153(29).

In another proceeding, VoiceStream and AT&T Wireless have asked the Commission to confirm that an ILEC refusal to provision UNEs to CMRS carriers is unlawful.²⁰ Until the Commission renders this confirmation order, and so long as ILECs choose to ignore their obligations under the Act, CMRS carriers have no choice but to acquire their critical MSC-to-base station circuits from ILECs pursuant to their special access tariffs.

One additional point bears mention concerning CMRS carrier use of special access services. ILECs would give the Commission the impression that the demand for special access facilities is "geographically concentrated."²¹ This is not accurate, at least as applied to CMRS carriers. Mobile customers demand ubiquitous coverage, which, in turn, requires CMRS carriers to disperse their cell sites widely throughout their licensed service areas. It is because of this dispersion that, in many instances, CMRS providers have no choice but to use ILEC special access services. As AT&T Wireless correctly notes:

AWS typically has no alternative but to utilize transport services from incumbent LEC special access tariffs. Incumbent LECs are the only carriers with ubiquitous transport networks that have facilities in place to or near the thousands of locations to which AWS requires transport.²²

Thus, perhaps more than any other type of competitive carrier, CMRS carriers remain particularly vulnerable to discriminatory and unsatisfactory ILEC provisioning of special access facilities.

²⁰ See VoiceStream and AT&T Wireless Petition for Declaratory Ruling, CC Docket No. 96-98 (Nov. 19, 2001). See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-339, 96-98 and 98-147, *Notice of Proposed Rulemaking*, FCC 01-361 (Dec. 20, 2001).

²¹ Verizon Comments at 6.

²² AT&T Wireless Comments at 7.

C. ILEC Myth No. 3: Reporting Requirements Would Be Burdensome

Some, but not all, ILECs contend that reporting requirements like those proposed by the Joint Competitive Industry Group (“JCIG”) would place new burdens on them. SBC claims, for example, that the cost of such reporting would be “enormous” and would “increase significantly the cost of providing [special access] services.”²³ BellSouth is more careful in its claims, stating only that reporting requirements would “represent *potential* cost increases associated with providing the service.”²⁴

These unsupported ILEC assertions defy reason and common sense, because the fact is that ILECs already maintain data concerning their special access performance, whether for internal purposes or for meeting existing reporting requirements (*e.g.*, ARMIS, FCC merger conditions, state reporting requirements). Indeed, ILECs acknowledge that they already submit reports to individual special access customers (with Verizon stating that it provides reports to 51 different carriers).²⁵

The measurement standards that competitive carriers ask the Commission to adopt would simply require ILECs to use uniform definitions and metrics for data they already track. The proposed reports would also give individual carriers access to critical information that they do not possess today – namely, information pertaining to the ILEC’s provisioning of circuits to others so each carrier can assess the ILEC’s performance regarding its own services. And while larger ILECs may be required to submit their data more frequently (*e.g.*, monthly) and on a more

²³ SBC Comments at 4.

²⁴ BellSouth Comments at 11 (emphasis added).

²⁵ See, *e.g.*, Verizon Comments at 9; SBC Comments at 12 (noting that its reports to WorldCom contain 38 different performance measurements).

disaggregated basis (*e.g.*, differentiating CMRS from IXC from CLEC), these proposals would impose no burden on ILECs. As AT&T correctly observes:

Disaggregation simply involves proper coding when data are collected and repetitive computations – a task readily and quickly accomplished by computers in the matter of a few seconds.²⁶

Further, imposition of a single notification report on a national basis would inherently be less costly to the ILECs than a state-by-state reporting regime.

ILECs additionally argue that the imposition of reporting requirements on them, but not on CLECs that possess no market power would “distort competition”:

Imposing special access performance requirements only on incumbent LECs would . . . skew competition by subjecting them to a different and more costly set of regulatory requirements than their competitors.²⁷

There is, however, nothing improper in imposing certain regulations only on those entities that possess market power.²⁸ As the New York Commission has observed, “[b]ecause competitors rely on Verizon’s facilities, . . . Verizon represents a bottleneck to the development of a healthy, competitive market for special services.”²⁹

²⁶ AT&T Comments at 28.

²⁷ SBC Comments at 14 and 15-16. *See also* Verizon Comments at 12-13; USTA Comments at 6.

²⁸ *See, e.g.*, 47 U.S.C. § 251(c)(imposing certain obligations on ILECs but not CLECs). *See also Policy and Rules Concerning Rates for Competitive Carrier Services*, CC Docket No. 79-252. There is, therefore, no basis to the ILEC argument that asymmetrical reporting requirements “would be of dubious legality.” Verizon Comments at 13. To the contrary, the Communications Act expressly permits the FCC to apply its regulations to a “class of telecommunications carriers.” 47 U.S.C. § 160(a).

²⁹ New York Public Service Commission, *Opinion and Order Modifying Special Services Guidelines for Verizon New York Conforming Tariff and Requiring Additional Performance Reporting*, Case Nos. 00-C-2051, 92-C-0665, at 9 (June 15, 2001).

It is important to remember that this proceeding would not have been necessary had ILECs been providing minimally acceptable service. The simple fact is, as the Commission has acknowledged, that benchmarking through the use of metrics constitutes “a relatively non-intrusive means of implementing pro-competitive policies and rules and of evaluating incumbent’s compliance with such requirements.”³⁰ Users of ILEC special access services agree that ILEC reporting would be the most effective means to get a grasp on this serious and extensive problem and as a means to return existing ILEC special access provisioning to minimally acceptable levels.

ILECs have had ample opportunity to address this problem without regulatory intervention. The *status quo* has not worked because, as VoiceStream has documented in its comments, the problem is getting worse, not better. Embarrassing ILECs by publishing their abysmal performance record appears to be the most cost-effective means to convince ILECs to repair the problems they themselves have created. The history of ILEC neglect of special access provisioning merits imposition today of performance metrics that are publicly available and noted.

II. WHILE THERE IS NO BASIS TO EXEMPT SMALLER ILECS, A DIFFERENT REGULATORY APPROACH IS WARRANTED

Rural ILECs ask to be exempted from any reporting standards that the Commission may adopt on the ground that they have “only a small share of the special access market” and do “not provide services to competitive local exchange carriers due to the rural exemption in Section 251(f) of the Communications Act.”³¹ In addition, the Small Business Administration (“SBA”)

³⁰ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14712, 14770 ¶ 125 (1999). See also *Verizon New York InterLATA Order*, 15 FCC Rcd 3953, 3974 ¶ 53 (1999)(“Performance measurements are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.”)

³¹ National Exchange Carrier Association (“NECA”), National Rural Telecom Association (“NRTA”), and Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) Joint Com-

apparently takes the position that rural ILECs are not dominant in their service areas.³² These assertions misstate the issue, for in their service areas, smaller ILECs maintain a truly dominant (if not, monopoly) position in the provision of special access services.³³

Chairman Powell has noted that wireless services represent the “best hope” for residential customers to enjoy a competitive alternative to the ILEC services.³⁴ This is particularly true in suburban and rural areas, where consumers rarely have a landline alternative to the ILEC’s services. CMRS carriers cannot provide services that compete with the ILEC unless they can connect their mobile switching centers (“MSCs”) with the base station (or cell site) equipment. In most suburban, and in virtually all rural areas, CMRS carriers have no choice but to use the special access services offered by smaller ILECs. That rural ILECs are small and may install relatively fewer numbers of special access services does not change the fact that for the facilities they do install, these ILECs are rarely subject to competitive pressure.³⁵ In addition, smaller ILECs share the same incentives as the larger ILECs: they can use their dominance in the special access market to distort competition in the retail market, by hampering the ability of CMRS carriers to compete with the ILEC’s fixed landline or affiliated cellular services.

ments at 3; Small Independent Telephone Companies Comments at ii. *See also* Comments filed by Independent Telephone & Telecommunications Alliance (“ITTA”); National Telephone Cooperative Association (“NTCA”); Rural ILEC Coalition.

³² *See* Initial Regulatory Flexibility Analysis, Docket No. 01-321, at ¶ 31.

³³ NTCA’s arguments concerning the Section 252(f) exemption for rural ILECs has no applicability to CMRS carriers since rural ILECs have long provided Type 1 and Type 2 interconnection to CMRS carriers. *See* NTCA Comments at 4. Besides, as NTCA recognizes, the FCC has ample authority over Section 251(f) exempt ILECs under Sections 201 and 202 of the Act. *See id.* at 3.

³⁴ *See* Hon. Michael K. Powell, Digital Broadband Migration II, FCC Press Conference (Oct. 23, 2001). *See also* Hon. Michael K. Powell, Remarks before the Association for Local Telecommunications Services (Nov. 30, 2001) (noting the growing importance of wireless services in offering competitive choices for consumers.); Hon. Michael K. Powell, Forrester Research Telecom Forum (May 21, 2001) (“[W]e underestimate the value of wireless as a substitute for local services.”).

Smaller ILEC provisioning of special access circuits to CMRS carriers will become even more important in the future. New entrant PCS licensees like VoiceStream, Leap Communications and Sprint PCS, continue to expand the geographic reach of their networks, and are beginning to provide services that compete with the smaller ILEC's landline services and the mobile services provided by the smaller ILEC's affiliated incumbent cellular carrier. Consequently, CMRS carriers are among the most exposed customers to deficiencies in smaller ILEC special access service installation, maintenance and repair.

In addition, only last week the Commission noted that the provision of high-speed DSL Internet service "may not be economically viable in many rural areas for rural telephone carriers" and that the provision of advanced services (*e.g.*, GPRS, EDGE, and 1xRTT) and eventually third generation services, by VoiceStream and other CMRS carriers offers "significant potential for expanding the availability of advanced telecommunications to more Americans":

The successful deployment of 3G wireless services may significantly expand availability of advanced services, especially to consumers that are currently underserved by wireline connections.³⁶

Given the monopoly position held by most smaller ILECs in the provision of special access facilities, the risk is very real that such ILECs will exercise their power to delay competitive entry – whether to protect their landline services or their affiliated incumbent cellular services.

VoiceStream acknowledges that a smaller ILEC's service area is often quite different than the dense population served by the largest ILECs and that this difference may affect the amount of time a smaller ILEC needs to install a special access facility. The answer to this dif-

³⁵ ITTA's assertion – "the market governs [rural ILEC] performance standards" (ITTA Comments at 9) – is not surprisingly made without factual support.

³⁶ See *Third Section 706 Report*, CC Docket No. 98-146, FCC 02-33, at p. 5, ¶ 80 and ¶ 114 (Feb. 6, 2002).

ference is not to exempt smaller ILECs from performance measurements altogether, since they possess anti-competitive incentives and abilities that equal or exceed those of the larger ILECs. Rather, as Sprint points out, the answer is to adopt different, less stringent performance measurements for smaller ILECs.³⁷

VoiceStream further appreciates that smaller ILECs may not have the automated systems possessed by the largest ILECs, although automated systems probably are much less important given the fewer special access circuits that smaller ILECs install.³⁸ Again, the answer to this difference is not to exempt smaller ILEC from reporting requirements altogether. Rather, as the Commission itself recognizes, the answer to require smaller ILECs to report their performance data less frequently (*e.g.*, twice a year vs. monthly).³⁹

The fact is that smaller ILECs wield as much (and often more) dominance in the special access market in their service territories than the power held by the largest ILECs in their service territories. While adjusting the frequency and detail of performance reports is certainly justified, exempting smaller ILECs from all obligations cannot be justified.

III. VOICESTREAM SUPPORTS THE JOINT COMPETITIVE INDUSTRY GROUP PROPOSAL, BUT THE PROPOSAL SHOULD BE EXPANDED TO INCLUDE A SEPARATE CATEGORY OF DATA INVOLVING CMRS CARRIERS

On January 22, 2002, a group of CLECs and IXC jointly submitted for the Commission's consideration proposed Performance Measurements and Standards for ILEC special access

³⁷ See Sprint Comments at iii and 11-15.

³⁸ VoiceStream believes that it is highly unlikely that smaller LECs using automated systems would face "costly and expensive overhaul" of these systems (*see* ITTA Comments at 7) since the raw performance inputs are relatively standardized within the industry (*e.g.*, FOC date). Besides, a smaller ILEC believing that any system modifications cannot be cost justified can seek an appropriate waiver to submit instead the data that its automated systems record.

³⁹ See Initial Regulatory Flexibility Analysis, Docket No. 01-321, at ¶ 35. It is also important that smaller ILECs be required to maintain their special access performance data so the information is available in the event a complaint is lodged.

services.⁴⁰ This document proposes measures and standards that the Commission and state regulators can use to detect discriminatory and unreasonable performance with respect to installation, maintenance and repair of special access facilities – information that is not currently available. Not surprisingly, since CLECs and IXCs prepared the proposal, the proposal would have ILECs submit performance reports segregating unaffiliated CLEC/IXC data from affiliated ILEC data.

The Joint Competitive Industry Group Proposal contains a uniform set of clear, practical, workable and enforceable measurements, and VoiceStream therefore supports and endorses the proposal. The proposal would also impose minimal or no implementation burdens on ILECs because the metrics are similar (if not identical) to those used with other regulatory reports, whether ARMIS, merger conditions or state reporting requirements.⁴¹

As VoiceStream and others have pointed out,⁴² however, CMRS carriers also make extensive use of ILEC special access facilities in connecting their mobile switching centers (“MSCs”) to their subtend base stations (or cell sites). As of June 2001, the CMRS industry collectively operated over 114,000 cell sites (contrasted with only 24,000 in June 1996, a growth of nearly 500 percent), and the vast majority of these sites are served by ILEC special access facilities.⁴³ Indeed, as noted above, CMRS carriers are generally more vulnerable to unreasonable and discriminatory ILEC special access practices because ILECs refuse to provide UNEs to CMRS carriers and because CMRS carriers need facilities in dispersed locations, locations that frequently only ILECs serve.

⁴⁰ See Letter from Joint Competitive Industry Group to the Hon. Michael K. Powell, FCC Chairman, Docket No. 01-321 (Jan. 22, 2002)(“Joint Competitive Industry Group Proposal”).

⁴¹ See, e.g., WorldCom Comments at 43-44.

⁴² See, e.g., VoiceStream Comments at 3-4; AT&T Wireless Comments at 3-4; Sprint Comments at 3.

⁴³ See CTIA’s Semi-Annual Wireless Industry Survey Requests, June 1985 to June 2001.

Accordingly, while endorsing the Joint Competitive Industry Group Proposal, VoiceStream further agrees with AT&T Wireless that the Commission should expand the reported data to include CMRS carriers' use of special access service.⁴⁴ American consumers perceive and have increasingly employed CMRS as a competitive substitute for local exchange as well as long distance services. A USA Today/Gallup poll showed that 18 percent of cellphone users employed cellphones as their primary phone.⁴⁵ Already, approximately two percent of American households have completely "cut the cord" and rely exclusively on CMRS. Reputable projections indicate that proportion rising to 11 percent by 2006, and to a strong, and perhaps overwhelming, majority share by 2012.⁴⁶

As VoiceStream and AT&T Wireless demonstrated in their comments, CMRS providers are vitally dependent on timely, non-discriminatory provision of ILEC special access circuits. Given the current and forecasted ability of CMRS to provide true facilities-based competition to ILECs, VoiceStream concurs with AT&T Wireless' conclusion that it is crucial that one of the reporting categories document ILEC performance in provisioning special access circuits to CMRS carriers, both affiliated and unaffiliated, and segregate this data from other users (*e.g.*, CLECs, IXC).⁴⁷ Separating these categories of CMRS-only reports is especially necessary in light of the January 1, 2002 sunset of the "separate affiliate rule" that required ILECs providing in-region broadband CMRS to do so through a separate affiliate.⁴⁸ The imposition of a separate, two-part, CMRS reporting category is the only comprehensive method by which the Commission

⁴⁴ See AT&T Wireless Comments at 15 and 18-19.

⁴⁵ See USA TODAY, "18% See Cellphones As Their Main Phones," at B-1 (Feb. 1, 2002).

⁴⁶ See Cnet News.com, "Study: Consumers Go Wireless At Home," (Jan. 29, 2002) . See also USA TODAY, *supra* ("vast majority [employing CMRS as main phone] in ten years.")

⁴⁷ AT&T Wireless Comments at 18.

can provide independent CMRS carriers with information as to whether ILEC-affiliated CMRS competitors are experiencing similar difficulties with special access circuit provisioning or are being given preferential treatment by the ILEC parent.⁴⁹ Although the Commission imposed no reporting regime in conjunction with the ILEC in-region CMRS "separate affiliate rule," this proceeding on special access performance poses a unique opportunity for the Commission to facilitate a meaningful evaluation of the competitive environment.

IV. THERE ARE MORE EFFECTIVE TOOLS THAN SUNSETTING TO TERMINATE REPORTING REQUIREMENTS IF AND WHEN THEY BECOME UNNECESSARY

The Commission has asked whether it should adopt a sunset for any new performance measures, and ILECs not surprisingly advocate adoption of a short sunset date, *e.g.*, "no later than two years after adoption."⁵⁰ There are numerous problems with a sunset date in a context like this. First, any sunset date that the Commission may establish would necessarily be arbitrary. The date may be too late for some carriers and premature for others. Indeed, the fact there is such a wide disparity in special access performance among different ILECs alone suggests that one, industry-wide sunset date would be inappropriate. In addition, grant of Section 271 approval would serve to increase, rather than decrease, an RBOCs incentive to discriminate against non-affiliated special access customers. This increased RBOC incentive is supported by the New York Commission's recent findings about Verizon's poor special access provisioning performance.

⁴⁸ 47 C.F.R. § 20.20(f)

⁴⁹ AT&T Wireless Comments at 6-7; Sprint Comments at 3-4.

⁵⁰ See, *e.g.*, Verizon Comments at 19.

An automatic sunset date also would have the real potential to be counterproductive, because it would reduce an ILEC's incentive to comply with its statutory obligations. As WorldCom explains:

[A]n automatic sunset date would provide incumbent LECs with an incentive to strategically delay their implementation of, and compliance with, Commission orders until the sunset date arrives.⁵¹

Importantly, a sunset date is not needed to avoid creating a regulatory program that will take on "a life of its own."⁵² Section 11 of the Act specifically requires the Commission to review biennially "all regulations," and this biennial review will necessarily include the performance measures the Commission adopts in this proceeding.⁵³ In addition, any ILEC believing that the performance measures are no longer required can seek a waiver or petition the Commission to forbear from applying any requirements.⁵⁴ ILECs should be rewarded for good performance. If a given ILEC consistently meets the benchmarks over time, VoiceStream, for one, would have no problem with relieving that ILEC of its reporting obligations so long as the ILECs performance does not deteriorate yet again.

V. CONCLUSION

VoiceStream agrees with the Illinois Commerce Commission's recommendation that the FCC "listen to the marketplace" in rendering its decision:

⁵¹ WorldCom Comments at 45.

⁵² Verizon Comments at 20.

⁵³ See 47 U.S.C. § 161(a).

⁵⁴ See 47 U.S.C. § 160; 47 C.F.R. § 1.3. Importantly, the Commission's forbearance powers include the ability to grant relief to a single telecommunications carrier or a class of telecommunications carrier. See 47 U.S.C. § 160(a).

Special access facilities are affected with a public interest if carriers must have them to compete, thereby making them an important component to a healthy competitive marketplace.⁵⁵

As New York correctly observes, a “global economy is dependent upon high-speed telecommunications circuits and special services are vitally important to the economic well being of competitors and business customers.”⁵⁶ Competition in the retail telecommunications market cannot flourish so long as ILECs exercise their market power over wholesale special access inputs competitive carriers need to provide their retail services. Further, as demonstrated above, CMRS carriers that offer the “best hope” to provide competition for an ILEC’s residential and Internet access services remain especially vulnerable to discriminatory and unreasonable ILEC special access performance practices.

⁵⁵ ICC Comments at 2.

⁵⁶ NYDPS Comments at 1-2.

For all the foregoing reasons, VoiceStream urges the Commission to adopt the Joint Competitive Industry Group Proposal, modified to recognize a separate CMRS carrier provisioning reporting classification with separate reports for affiliated and unaffiliated CMRS carriers.

Respectfully submitted,

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